MOTION FILED
MAY 18 1989

No. 88-1692

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

ASSOCIATED BUILDERS, INC.,
Petitioner,
v.
CLARENCE MEIGGS, *et al.*,
Respondents.

FAITH CONSTRUCTION COMPANY,
Petitioner,
v.
TERRY FRAZIER, *et al.*,
Respondents.

KBR CORPORATION,
Petitioner,
v.
HARRY HOBBS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF MINORITY CONTRACTORS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

FREDERICK B. ABRAMSON *
SACHS, GREENEBAUM & TAYLER
Suite 900
1140 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 828-8225
Counsel for Amicus Curiae National Association of Minority Contractors

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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The National Association of Minority Contractors ("NAMC") respectfully moves for leave to file the attached brief *amicus curiae*. The consent of counsel for petitioners to the filing of this brief has been obtained.

The consent of counsel for respondents was requested but refused.

NAMC is a national organization representing minority-owned enterprises principally engaged in the construction industry. NAMC participated as an *amicus* arguing in favor of the result reached by this Court in *WMATA v. Johnson*, 467 U.S. 925 (1984). Indeed, in its decision the Court expressly noted NAMC's strong interest in the issues raised in *Johnson*. *Id.* at 929. In the five years since the *Johnson* decision, NAMC's members have relied on and significantly benefitted from the outcome of that case. The lower court's refusal to follow *Johnson* threatens the interest of NAMC as established in that case.

Most minority contractors are small and/or new companies that are subcontractors or sub-subcontractors that perform small, discrete portions of an overall construction project delegated by a general contractor. The lower court's decision will greatly impede the expansion of minority participation in the construction industry because exposing a general contractor to tort liability for injuries sustained by a subcontractor's employees will diminish, if not destroy, the contractor's willingness and incentive to delegate a portion of its work to minority contractors. Moreover, the lower court's decision will preclude general contractors from using a wrap-up insurance program as a means of providing comprehensive compensation coverage for minority contractors, who, as new entities without established risk/loss histories, have generally been unable to obtain general insurance coverage at rates competitive with the coverage available to more established, larger contractors. Consequently, minority contractors will be precluded from participating in construction projects subject to the District of Columbia Workers' Compensation Act of 1979.

NAMC accordingly submits that its participation as *amicus* will help ensure that the Court is presented with a full exposition of interests that this Court found to be significant in *Johnson* and that have been seriously undermined by the decision below.

Respectfully submitted,

FREDERICK B. ABRAMSON *
SACHS, GREENEBAUM & TAYLER
Suite 900
1140 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 828-8225
Counsel for Amicus Curiae
National Association of
Minority Contractors

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF *AMICUS CURIAE*	2
SUMMARY OF ARGUMENT	4
ARGUMENT	4
THE DECISION BELOW WILL UNFAIRLY AND IMPROPERLY PRECLUDE MANY MINORITY CONTRACTORS FROM PARTICIPATING IN CONSTRUCTION PROJECTS IN THE DISTRICT OF COLUMBIA	4
CONCLUSION	8

TABLE OF AUTHORITIES

CASES Page

Fullilove v. Klutznick, 448 U.S. 448 (1980) 5
United Steel Workers v. Weber, 443 U.S. 193 (1979) 5
WMATA v. Johnson, 467 U.S. 925 (1984) ..... *passim*

STATUTES AND REGULATIONS

District of Columbia Workers' Compensation Act of 1979, D.C. Code Ann. §§ 36-301 *et seq.* (1981) ("1979 Act") 3
49 C.F.R. § 23.45, Appendix A (1987) 6

OTHER AUTHORITIES

General Service Administration's Wrap Up Study, (August 22, 1975) 6
Insurance for Urban Transportation Construction, Report No. UMTA-MA-06-0025-77-13 (June 1977) 6, 7
Urban Mass Transportation Administration, Department of Transportation, Circular C1165.1 (December 30, 1977) 6

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BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF MINORITY CONTRACTORS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The National Association of Minority Contractors ("NAMC") is a national organization representing minority-owned enterprises principally engaged in the construction industry. NAMC participated as an *amicus* in this Court's *Johnson* decision and argued in favor of the result reached by the Court in that case. Indeed, in the course of its decision, the Court expressly noted NAMC's strong interest in the outcome of the case, *WMATA v. Johnson*, 467 U.S. 925, 929 (1984), and in the five years since the decision NAMC's members have relied on and significantly benefited from it. Through its brief here, NAMC seeks to preserve its interest as established in *Johnson* and to overturn the lower court's refusal to follow that decision.

Most minority contractors are small and/or new companies that have been able to compete with the more established and larger companies only through federal assistance and innovative methods of removing financial impediments. Often minority contractors are not only subcontractors, but sub-subcontractors performing a small, discrete portion of an overall project that might have been performed by the delegating contractor. By exposing a general contractor to tort liability for any injuries suffered by the minority subcontractor's employees, the decision below seriously diminishes and may well destroy a contractor's willingness and incentive to delegate a portion of its work to small minority concerns. As a result, the decision below will greatly impede expansion of minority participation in the construction industry.

The decision below will also harm minority participation because of its adverse effect on one of the most serious barriers faced by minority contractors—the ability to obtain insurance. Because they are often new entities without established risk/loss histories, minority contractors have generally been unable to obtain general

insurance coverage at rates competitive with the coverage available to the more established, larger contractors. Partly as an effort to address this problem, the federal government has recommended the use of wrap-up insurance programs such as that used in *Johnson* and often used by principal contractors.[1] The decision below, however, would preclude general contractors, such as the current petitioners,[2] and, the amicus, Washington Metropolitan Area Transit Authority, from employing a wrap-up insurance program as a means of providing comprehensive compensation coverage for minority contractors under the District of Columbia Workers' Compensation Act of 1979, D.C. Code Ann. §§ 36-301 *et seq.* (1981) ("1979 Act"). Because most minority contractors cannot obtain individual insurance coverage at competitive rates, the effect of the decision below will be to preclude them from participating in construction projects subject to the 1979 Act by resurrecting the financial barriers wrap-up insurance had removed.

Accordingly, the decision below has exacerbated the serious problems already inflicted upon minority contractors by the executive branch's continued reduction of federal assistance for construction projects. Because

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[1] *See* pp. 6-8, *infra*. Wrap-up insurance programs provide that the overall general contractor purchases insurance coverage for all contractors, subcontractors and, as frequently is the case with minority contractors, sub-subcontractors. This removes the cost of insurance as a factor in submitting a bid, by eliminating differences resulting from the insurance industry's evaluation of a particular contractor's risk of loss.

[2] While the Petitioners here did not utilize wrap-up insurance, the decision below provides immunity only to an immediate employer that purchases compensation coverage. In the case of wrap-up programs, the decision below would expose *all* subcontractors (including the immediate employer) to tort suits, thus making a wrap-up program completely impractical. *See* Pet. App. 15a. Indeed, if the *Meiggs* immunity rule had been applied in the *Johnson* litigation, this would have meant creating over 1000 potential defendants. *See Johnson*, 467 U.S. at 927.

such judicial action effectively diminishes the participation of minority concerns in the construction industry, NAMC urges the Court to grant certiorari and reverse the decision.

SUMMARY OF ARGUMENT

The decision below improperly rejects this Court's construction of the statutory language at issue and, unless reversed, will seriously curtail recent efforts to increase minority participation in the construction industry. The decision thereby defeats the strong federal interest in securing the maximum participation of minorities in business enterprises and in ensuring that District of Columbia employees are covered by compensation insurance at all times.

ARGUMENT

THE DECISION BELOW WILL UNFAIRLY AND IMPROPERLY PRECLUDE MANY MINORITY CONTRACTORS FROM PARTICIPATING IN CONSTRUCTION PROJECTS IN THE DISTRICT OF COLUMBIA.

In the decision below, the District of Columbia Court of Appeals has found that contractors should be liable for tort suits brought against them by their subcontractors' employees (already compensated by workers' benefits) through its interpretation of the *exact same statutory language* that this Court held entitled such contractors to employers' immunity. *See Washington Metropolitan Area Transit Authority v. Johnson*, 467 U.S. at 939-40. The Court of Appeals (like the reversed D.C. Circuit in *Johnson*) based its ruling on its policy concerns about the "humane purpose" of the statute. Pet. App. 15a-16a. As petitioners note, it is the D.C. Council and the Congress that have the duty of weighing such policy considerations, not the D.C. Court of Appeals. Pet. 25-26. Moreover, consideration of policy concerns involves the balancing of the interests of *all* affected parties—employees *and* employers—subcontrac-

tors *and* general contractors. Here, the D.C. Court of Appeals made no mention of and apparently never considered the interests of minority contractors.

By exposing general contractors to tort liability, the decision below harms minority contractors in several ways. If the decision below is allowed to stand, contractors will obviously seek to limit their liability by performing more of the work through their own employees. This will necessarily harm minority contractors who, as subcontractors, often have a very small share of the general contractors project—shares that may be taken over and performed by larger contractors.

Even where the contractor is compelled by statute or conscience to use minority concerns, only the more established larger minority firms will likely receive the work because the decision below destroys the concept of wrap-up insurance in the District of Columbia and thus will preclude many minority contractors from effectively competing for construction subcontracts. Indeed, this Court specifically recognized this risk in *Johnson* when it noted that "many minority subcontractors [are] unable to afford or lack[] sufficient business experience to qualify for their own workers' compensation insurance policies." 467 U.S. at 929. The D.C. Court of Appeals decision will therefore exacerbate the already serious racial imbalance in the construction industry. *See, e.g., United Steel Workers v. Weber*, 443 U.S. 193, 198 n.1 (1979) (collecting such findings).

This elimination of minority contractors from projects subject to the 1979 Act is directly contrary to the efforts of the federal government to increase minority participation in the construction industry.[3] For example,

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[3] *See Fullilove v. Klutznick*, 448 U.S. 448, 478 (1980) (noting that Congress has acted to eliminate "barriers to minority firm access to public contracting opportunities" in order "to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments").

the Urban Mass Tranportation Administration has expressly recommended wrap-up programs as a means of reducing the financial barriers that typically bar participation of minority concerns. In fact, the Urban Mass Transportation Administration directs applicants for federal funds to consider "providing wrap-up insurance for contractors and subcontractors" as a means "to overcome barriers to [minority program participation]." Urban Mass Transportation Administration, Department of Transportation, Circular C1165.1 at 14 (December 30, 1977). *Accord*, 49 C.F.R. § 23.45, Appendix A (1987).

Furthermore, a detailed study of wrap-up programs performed for the United States General Services Administration recommended the use of wrap-up programs for all projects exceeding $20 million in total costs, and expressly recognized that such programs maximize the participation of minority concerns. General Service Administration's Wrap Up Study, p. 14, 17 (August 22, 1975). A similar study performed for the United States Department of Transportation also recommended the implementation of wrap-up insurance programs for all major construction projects, again noting that such coverage is the only practical way that minority concerns can effectively compete for subcontracts on such projects. Insurance for Urban Transportation Construction, Report No. UMTA-MA-06-0025-77-13, at p. 1-21 (June 1977).

The principal advantage to minority contractors of wrap-up or similar insurance is that it eliminates the cost of insurance when bidding on a project. The fledgling status of many minority contractors makes them an unknown risk to insurance companies. Additionally, minority contractors are often undercapitalized, having little equity with which to guarantee the continuous and timely payment of premiums. It is a natural commercial response on the part of the insurance industry to charge

an increased premium to such concerns. Unfortunately, these new concerns lack the profit margins of more established firms, and the additional cost of paying insurance premiums will frequently make the difference between a successful or unsuccessful competitive bid.

For those minority contractors that make successful bids, it is probable that some employees will be subjected to periods without compensation coverage, which is a result obviously contrary to the principal "humane" purpose of the 1979 Act. Many new minority contractors do not have the commercial experience and knowledge of the insurance industry to calculate accurately the cost of insurance when submitting a bid that may be two or three years in anticipation of actual work. The premiums for compensation coverage, already high, can sharply increase over the lifetime of a contract because of legislative action and actual loss experience. Premiums for compensation insurance constitute a substantial portion of the bid price of a construction contract.[4] If a minority contractor miscalculates the cost of premiums (or any other such substantial cost), the contractor will be faced with the dilemma of making a payroll or paying insurance premiums. The pressures to take the first option are obvious. Any missed premiums result in the termination of insurance, thereby exposing employees to periods without coverage for compensation.

Another factor causing lapses in insurance coverage is the utilization of financially uncertain insurance companies. It is an unfortunate fact of commercial life that minority contractors are not attractive as customers for established insurance carriers. Many minority contractors are forced to use smaller, fiscally weak insurance companies because they are the only carriers willing to provide them coverage. Some of those carriers can and do fail for various reasons, again exposing employees to periods without coverage.

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[4] *See* Insurance for Urban Transportation Construction, Report No. UMTA-MA-06-0025-77-13 at p. 4-1.

It is not our view, of course, that the court below should necessarily have weighed the concerns of minority contractors in construing the statutory language at issue. Rather, our view is that once a court begins to act as a legislature and construe language based on policy concerns—rather than on the basis of the plain words of the statute—it will inevitably overlook and undermine certain critical policy concerns. That is what has happened here, thereby underscoring the importance of this Court's admonition—repeated in *Johnson* itself—that the court's role is to adhere strictly to the words of the statute. 467 U.S. at 934. That admonition should have had special force where, as here, this Court has already definitively determined that the meaning of those words is "clear" and "plain" on the face of the statute. Because the court below refused to accept that meaning, and because that refusal has upset important interests acknowledged by this Court in *Johnson*, the Court should grant certiorari.

CONCLUSION

For the foregoing reasons, the National Association of Minority Contractors respectfully urges the Court to grant the petition for a writ of certiorari and to reverse the decision below.

Respectfully submitted,

FREDERICK B. ABRAMSON *
SACHS, GREENEBAUM & TAYLER
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Washington, D.C. 20036
(202) 828-8225
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